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Judge - Supreme Court, U.S.

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ALEXANDER L. STEVAS,
CLERK

NO. _____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

HENRY ROSTEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Was the petitioner's right to due process of law, as guaranteed him by the Fifth Amendment, violated when the Court of Appeals held, as without merit, his claim that it should examine the impounded data relative to any involvement of the Central Intelligence Agency with the co-defendant Kevin Barry Krown, First London Bank and Trust Company and/or the First National Bank of Tehran, S.A.K.?

2. Was the refusal of the Court of Appeals to rule upon the aforesaid request a violation of the requirement under *Brady v. Maryland*, 373 U.S. 83 (1963) as to the prosecutorial divulgement of exculpatory material?

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**SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982**

HENRY ROSTEN,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT**

Henry Rosten hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit which affirmed a judgment of conviction entered against him in the United States District Court for the Southern District of New York.

ORDER BELOW

An opinion and order was rendered by the United States Court of Appeals for the Second Circuit which is set forth in the Appendix as "Exhibit A".

JURISDICTION

The judgment of affirmance of the Court of Appeals was dated and entered on April 1, 1982. Jurisdiction is conferred upon this Court by 28 U.S.C. 1254(1).

CONSTITUTIONAL AMENDMENT INVOLVED

ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

REASON FOR GRANTING THE WRIT

The petitioner contends that at trial he was deprived of the right to due process of law as guaranteed him under the Fifth Amendment to the United States Constitution.

STATEMENT OF FACTS AT TRIAL

The petitioner Henry Rosten was indicted and charged in six (6) counts of a fifty-six (56) count indictment filed in the United States District Court for the Southern District of New York, with the crimes of conspiring to and substantively violating the federal laws prohibiting mail, wire and bank frauds.

He proceeded to trial before the Hon. Lee P. Gagliardi of that Court and a jury, found guilty and thereafter sentenced to a concurrent fifteen (15) month term of imprisonment.

The instant petition is from the aforesaid judgment of conviction, which was affirmed in an opinion rendered by the United States Court of Appeals for the Second Circuit and as to which an application for a rehearing en banc was denied.

The writer was assigned to represent the petitioner in the United States District Court for the Southern District of New York and that assignment has been continued by the aforesaid Court of Appeals.

A motion for leave to proceed in forma pauperis has been made to this Court.

The facts, as adduced by the government at trial, can be synthesized in the following applicable fashion.

Dwight Garretson, a Special Agent of the Federal Bureau of Investigation, testified that from January, 1977 until June, 1980, he was a legal attache attached to American embassies in the eastern Caribbean including the island of St. Vincent. As such on December 30, 1977 he determined that the First London Bank and Trust Company was registered as an international company. Moreover, that its name was, on August 15, 1978, changed to First National Bank of Tehran, S.A.K. He further testified that he visited the premises of the bank and did not see any vaults, tellers, counters or any indication that a bank was in operation (T. 212-13).*

William Perry testified that he was in the banking business with the co-defendant Kevin Barry Krown and described the banking activities of the co-defendant, Maurice Benjamin, who supplied letters of guarantee to Krown.

He further related that he introduced Helmut Blum, a Certified Public Accountant of Frankfurt,

*Numerals in parentheses preceded by a "T" refer to pages of the Trial Transcript.

West Germany, to Maurice Benjamin, and subsequently formed an off-shore bank with Krown. This to be predicated upon a 1971 financial statement, recertified by Blum that the London Cambridge Insurance Company had assets of 250 million United States dollars. He further related that he told Krown that there were no such assets and that the statement was worthless. Whereupon Krown and Benjamin agreed to form the First London Bank, each to own fifty per cent thereof (T. 303), and to operate it in the same fashion as Benjamin had operated his own bank, i.e., the Exchange National Bank (T. 305).

Perry further related that Krown thereafter recertified Blum's financial statement. This was eventually filed with the local authorities in St. Vincent for the purpose of obtaining a bank charter, and subsequently reproduced in booklet form (T. 336).

Thereafter the First London Bank and Trust Company obtained a charter and various bank instruments were issued. It was moreover listed in "Polks" advertising directory of Caribbean banks. However, it had no assets and could not provide the banking services that it represented.

Rosten admittedly had nothing whatever to do with the formation of the bank (T. 549-50).

William Stumb, an employee of R.L. Polk & Company, the publishers of Polks World Bank Directory, described the procedure whereby foreign banks were listed in the World Bank Directory.

Hugh Boyd, another employee, testified that Krown wished to and had the First London Bank and Trust Company advertise in the aforesaid World Bank Directory.

Nicholas Agostino testified as to his dealings as a finder for Krown with respect to the First London Bank, as well as the operations thereof (T. 670-85).

He related that he was involved in a transaction with Krown and the petitioner, Henry Rosten, involving a \$50,000 letter of credit that was issued for a \$5,000 commission (T. 702), as well as a one million dollar certificate of deposit involving a Tennessee Insurance Company (T. 702).

The witness testified that in the late spring or early summer of 1978 he was introduced to the petitioner by the co-defendant Costanzo. That the latter told him that the petitioner was a finder and that they were running together (T. 706). He was additionally told by Costanzo that the petitioner was associated with a Mr. Guggenheim, who was a phony, and that he did not really belong to the Guggenheim family (T. 707).

Agostino further related that in June of 1978 he met Costanzo and Rosten, at the airport, at which time he gave them a one million dollar certificate of deposit drawn on the First London Bank and which had been prepared by Krown.

Some time thereafter he again met Rosten and Costanzo. The latter together with one Nat Rosenberg left to go to the airport terminal, and upon their return each had envelopes. Rosenberg and Agostino then went to Krown's apartment (T. 726).

Agostino further related that in the late summer of 1978, he together with Costanzo and the petitioner had a conversation in the petitioner's apartment at which time he was told by them that they were going to open in Jamaica with Mr. Guggenheim.

Irving King, the Assistant Treasurer of the Central State Bank, related that the First London Bank and Trust Company had an account with said bank.

James E. Spry, the plant manager of Deluxe Check Printers, testified that checks were printed by it for the First London Bank and Trust Company Limited.

Manuel Delahoz, a former employee of Citibank, testified that the bank cashed two checks drawn on the First London Bank and John Fitzgerald, an assistant manager, testified that the checks were uncollectable.

Owen C. Murray, an uncertified Tennessee insurance underwriter, testified that in order to obtain a certificate of authority from the Tennessee Insurance Commission, his company needed \$1,300,000 in capital and surplus. Not having that amount he sought additional capital in the form, amongst others, of a certificate of deposit and eventually contacted the petitioner.

There was an initial telephone conversation at which time Murray described the use to be made of the certificate of deposit and that it was to be unencumbered, i.e., cashable and usable. Rosten responded that there should be no difficulty in obtaining such a document and that he was closely associated with one David Guggenheim.

The witness then went to New York where he met the petitioner and Costanzo.

Rosten told him that he would not be able to obtain a certificate of deposit through the Chase Manhattan Bank but would obtain it through the First London Bank and Trust Company.

That the latter was a well-funded company and that there would be no difficulty in the certificate being recognized by the insurance department as a part of his financial statement. That a telex would be sent confirming the issuance of a certificate of deposit in the name of the Tennessee insurance company (T. 1240).

That the fee for obtaining said certificate of deposit was to be \$90,000, \$50,000 down and \$10,000

per month for the succeeding four months (T. 1240-41).

Thereafter he was introduced by the petitioner to David Guggenheim. Murray subsequently issued a post-dated check for the amount of the certificate of deposit and in turn received the same. He also received a telex indicating the issuance of the certificate of deposit signed by Krown. This in turn was given to the First Tennessee Bank. The latter however forwarded to Murray a bulletin issued by the Comptroller of the Currency.

He thereafter received telephone calls from Krown requesting the initial \$10,000 monthly payment. Also from Costanzo as to alternate funding, and from the petitioner offering to assist him through certain financial sources in Connecticut (T. 1259).

A meeting was subsequently held in New York, attended by Federal Bureau of Investigation agents, with the petitioner and Costanzo. There Costanzo gave a copy of a financial statement of the First London Bank, as well as a sheet from the Polks Directory.

Murray stated that the use of the certificate of deposit was inhibited as a result of the bulletin from the Comptroller of the Currency. Costanzo then was alleged to have replied that it was inapplicable and referred only to other documents (T. 1224).

The witness further related that the petitioner joined in the conversation, but was unable to specify any aspect thereof save that he would assist in obtaining capitalization (T. 1265). Moreover that the bank had substantial mining properties in Peru, as well as holdings in Germany, and that it was well funded.

On the following day, Murray, in the absence of the petitioner, together with agents of the Federal Bureau of Investigation, met with Krown and discussions were had as to the assets of the bank.

Jerry Thompson, who provided the \$50,000 to Murray to rent the certificate of deposit, testified that he met the petitioner at the Roosevelt Hotel. That the petitioner stated that he had gone to great trouble to obtain the certificate of deposit, that it was a good certificate, that it was usable in the way that Murray wanted to use it and that it was backed by the Guggenheim (T. 1346).

He also testified that after he had learned of the invalidity of the certificate of deposit he had a telephone conversation with the petitioner. The latter was then alleged to have stated that there was some mistake, the certificate would be made good and in a few days everything would be straightened out. Moreover, the petitioner is alleged to have stated that the money that had been paid was non-refundable, and at Thompson's request forwarded a copy of the financial statement to the bank (T. 1348-49).

Thompson further related that he contacted the Bank at St. Vincent and was assured that it was a valid artifact. He also contacted Blum in West Germany, who assured him that the bank assets were real and that if the witness had bank paper it was good paper (T. 1351).

John Barry, a Special Agent of the Federal Bureau of Investigation, testified that he accompanied Murray to the July 17, 1978 meeting with Rosten and Costanzo where the latter acknowledged receipt of the \$50,000. Additionally there was a discussion as to merchant banking. Thereafter the petitioner was alleged to have told Agent Barry that the type of banking arrangement that Murray had become involved in was a merchant bank arrangement and that such banks occasionally had more money than the Bank of America. Agent Barry further related that the petitioner assured Murray and him

that the First London Bank and Trust Company was "well footed". The co-defendant Costanzo thereupon was alleged to have demonstrated as bona fides an advertisement from Polks Banking Directory and a certified statement prepared in Germany showing that the assets of the bank were in excess of 200 million dollars (T. 1379-81).

Additionally Rosten was alleged to have stated that if the Germans had certified the statement it must be right (T. 1381).

On cross-examination Agent Barry conceded that he could not recall the context in which Mr. Guggenheim's name was mentioned or that Mr. Guggenheim guaranteed the financial instrument that was issued to the Tennessee Valley Insurance Company. He further conceded that no one at the meeting on July 7, 1978 asked the petitioner whether anyone from the Guggenheim family stood behind the bank or the certificate of deposit.

John Rooney, a branch operating officer of the Chemical Bank, testified that the petitioner had deposited a \$1,000 check which was made payable to Krown, but which was credited to the account of the First National Bank of Tehran and thereafter returned as drawn on insufficient funds (T. 3114).

A motion to dismiss under Rule 29 of the Federal Rules of Criminal Procedure predicated upon an evidentiary insufficiency as to knowledge and intent was timely made, reserved and subsequently denied.

A stipulation was entered into at the close of the entire case to the effect that if Agostino was recalled he would testify that in the summer of 1978 he had a conversation with the petitioner at which time the latter stated that he was going to set up a bank in Jamaica just like Krown's. Additionally that a charter would be obtained in the same manner using the same

paper, except that cashiers checks, the source of the problems, would not be used.

The petitioner, who did not testify nor call any witness on his behalf, was found guilty as charged.

POINT ONE

THE PETITIONER WAS DENIED DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AMENDMENT WHEN THE COURT OF APPEALS DEEMED MERITLESS HIS CLAIM THAT IT SHOULD EXAMINE THE IMPOUNDED DATA RELATIVE TO ANY INVOLVEMENT OF THE CENTRAL INTELLIGENCE AGENCY WITH THE CO-APPELLANT KEVIN BARRY KROWN, FIRST LONDON BANK AND TRUST COMPANY, AND/OR THE FIRST NATIONAL BANK OF TEHRAN, S.A.K.

On April 16, 1981, some forty (40) days after verdict, counsel for the key co-defendant Kevin Krown addressed the following singular communication to the Court:

Saxe, Bacon & Bolan, P.C.
39 East 68th Street
New York, New York 10021

Hon. Lee P. Gagliardi
United States District Judge
United States Courthouse
Foley Square
New York, New York 10007

Re: *United States v. Krown*
S80 CR 673 (LPG)

Dear Judge Gagliardi:

Please consider this letter as an application to adjourn Kevin Krown's sentence from April 29, 1981 to May 19, 1981. I understand that the sentences of three co-defendants have already been adjourned to the May date.

I have been informed that developments in the sentencing hearing of Mr. Krown (and Mr. Feeney) which occurred before the Honorable Fred M. Winner, Chief Judge of the United States District Court for the District of Colorado on April 6-9, 1981, may have—and in my humble opinion—will have a substantial impact on both the sentencing phase of the New York case as well as on its future litigation. We ask for the May date to enable us to transmit to you a copy of the transcript of the aforesaid Denver proceedings which should be available by the end of this month.

By this letter I also seek authorization from the Court to advise Chief Judge Winner in writing that at the trial in New York a proffer of proof was made by me, as counsel for Mr. Brown, relating to Mr. Krown's relationship, or that of his bank with the U.S. Central Intelligence Agency. I do not intend to enumerate the specifics of such proffer, but to merely communicate that same was made. In light of the fact that this was done *in camera* I feel that I cannot divulge even the fact that it was done without this Court's authorization.

Thank you for your patience and invariable courtesies.

Respectfully,

Michael Rosen

MR:ds

cc: A.U.S.A. Carolyn Henneman
One St. Andrew's Plaza
New York, New York 10007

Predicated upon the same the petitioner, pursuant to Rule 33 of the Federal Rules of Criminal Procedure, moved for a new trial and sought a hearing. This application was based upon the constitutional mandates set forth as to exculpatory material in *Brady v. Maryland*, 373 U.S. 83 (1963); governmental intrusion as prohibited by *Messiah v. United States*, 377 U.S. 201 (1964) and prosecutorial impropriety exceeding that barred in *Hampton v. United States*, 425 U.S. 484 (1976) and *Rochin v. California*, 342 U.S. 165 (1952).

The Trial Court denied the application stating that all the material referred to in the letter was impounded and available for inspection by the Court of Appeals.

That on direct appeal it was requested that the Court of Appeals, *in camera*, examine all of the aforesaid impounded material and determine whether error was committed in not making the same available to defense counsel.

The Court of Appeals made no pointed response to this request in rendering its initial determination or in denying a rehearing en banc.

It is not without significance that the writer of the above letter had previously made reference to covert contact between Agent Gerretsen of the Federal Bureau of Investigation and Krown, as well as between Krown and the Central Intelligence Agency (T. 247, 248, 308, 310, 3433, 3434).

It is submitted that the refusal of the Court of Appeals to conduct an *in camera* examination of the impounded material and make a finding with respect thereto, unduly limited the scope of cross-examination of the prosecution witnesses, deprived the petitioner of due process of law and was violative of the requirement of prosecutorial disclosure as mandated under

Brady v. Maryland, supra, and thus violative of the Fifth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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